

88-2009

Supreme Court, U.S.
FILED

MAY 18 1984

ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

1983-84 Term, 1984

No. _____

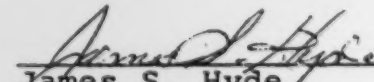
Mose Mathis and Sidney Mathis, Petitioners

v

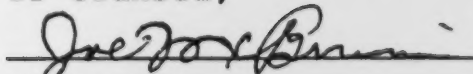
Luther Hegwood, et. al.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF GEORGIA


James S. Hyde
1500 Dodds Avenue
Chattanooga, TN 37404
(615) 629-2795

of Counsel,


Joe McBrien
James Building
Chattanooga, TN 37402

QUESTIONS PRESENTED

In a case of writ of possession against Petitioners, were the Petitioners denied due process of law and equal protection under the Fourteenth Amendment when the Georgia trial court imposed sanctions dismissing their cause with full prejudice for failure of Petitioners to appear at a deposition which was scheduled by adverse counsel, one day after petitioners' counsel had filed a motion to withdraw and Petitioners understood that the deposition would be re-scheduled?



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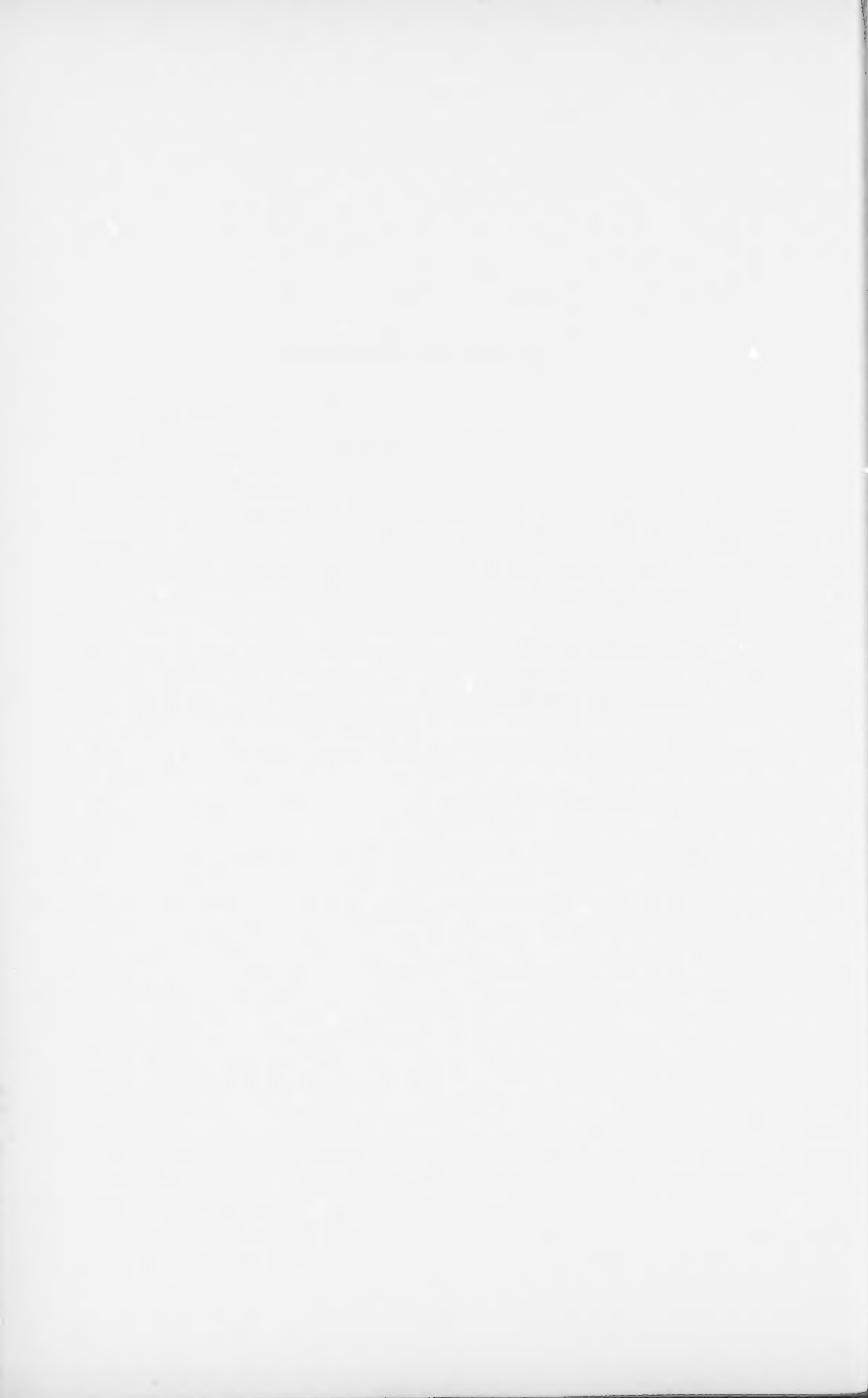


TABLE OF AUTHORITIES

Mayer V. Interstate Fire Insurance Company;

243 Ga. 436; 254 S.E. 2d 825 (1979)

Cook V. Lassiter, 159 Ga. App. 24, 282 S.E.

2d 680, (1981)

United State Constitution, Amendment Fourteen



IN THE SUPREME COURT OF THE UNITED STATES

_____ Term, 1984

No. _____

MOSE MATHIS and SIDNEY MATHIS, Petitioners

V

LUTHER HEGWOOD, et. al.

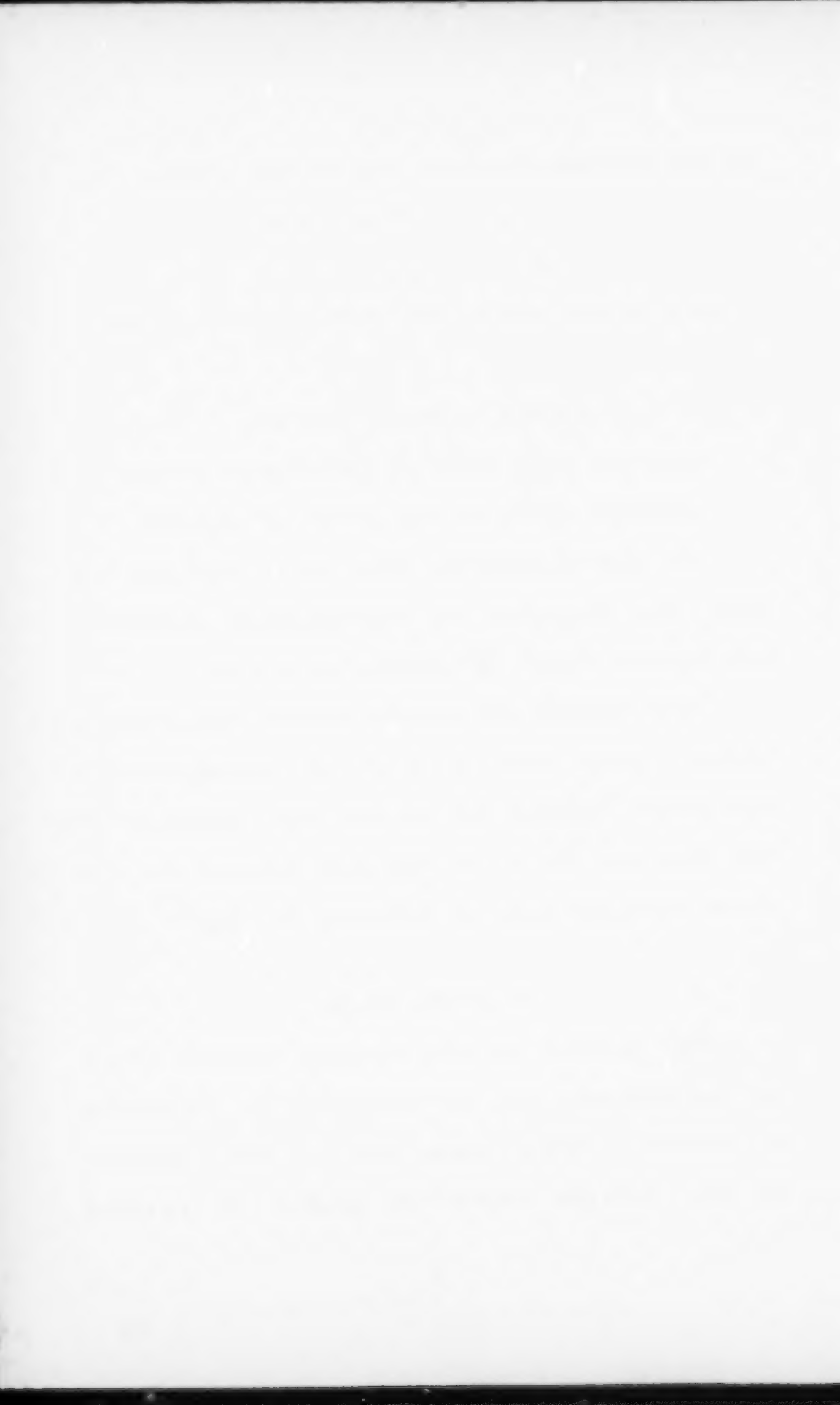
PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF GEORGIA

To the Honorable, the Chief Justice and
Associate Justices of the Supreme Court of
the Supreme Court of the United States:

MOSE MATHIS and SIDNEY MATHIS, Petitioners
herein, pray that a writ of possession of
certiorari issued to review the judgment of
the Supreme Court of Georgia entered in the
above entitled case on February 22, 1984.

OPINIONS BELOW

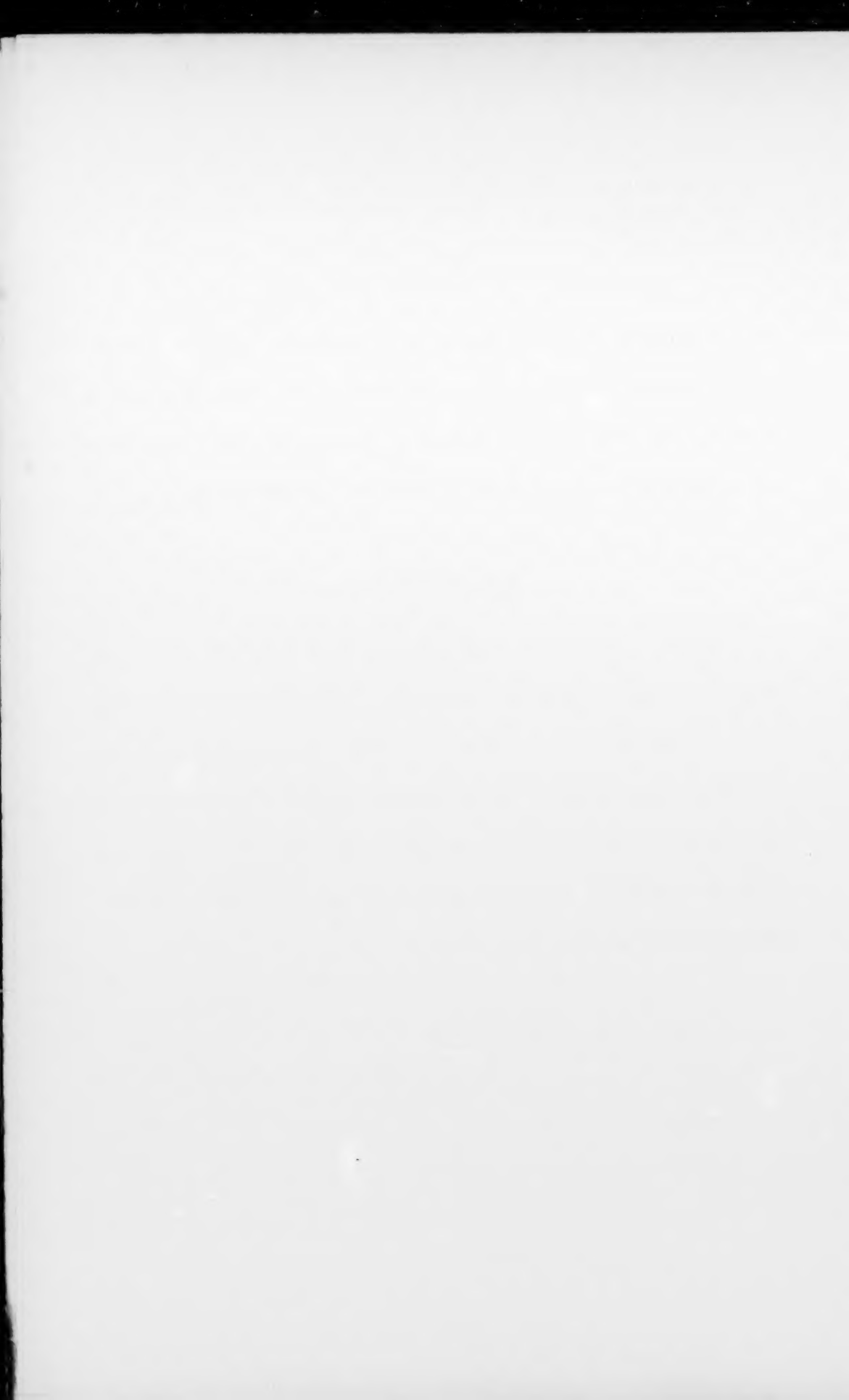
The opinion of the Georgia Supreme Court
is unreported and is printed in (Appendix
A, hereto, infra, page one). The judgment
of the Georgia Court of appeal is printed



in (Appendix A, hereto, infra, page two), the journal entry of judgment of the Superior Court of Walker County, Georgia is printed in (Appendix A, hereto, infra, page five).

JURISDICTION

The judgment of the Supreme Court of Georgia (Appendix A, hereto, infra, was entered on February 22, 1984. The jurisdiction of the Supreme Court is invoked under the Fourteenth Amendment to the Constitution of the United States (denial of due process of law and equal protection under the law.)



QUESTIONS PRESENTED

Whether sanctions imposed upon the Petitioners by the Georgia trial Court for failure to attend deposition due to misunderstanding as to date of deposition, constitutes denial of due process and equal protection under the law.

STATUTE INVOLVED

United States Constitution, Amendment XIV

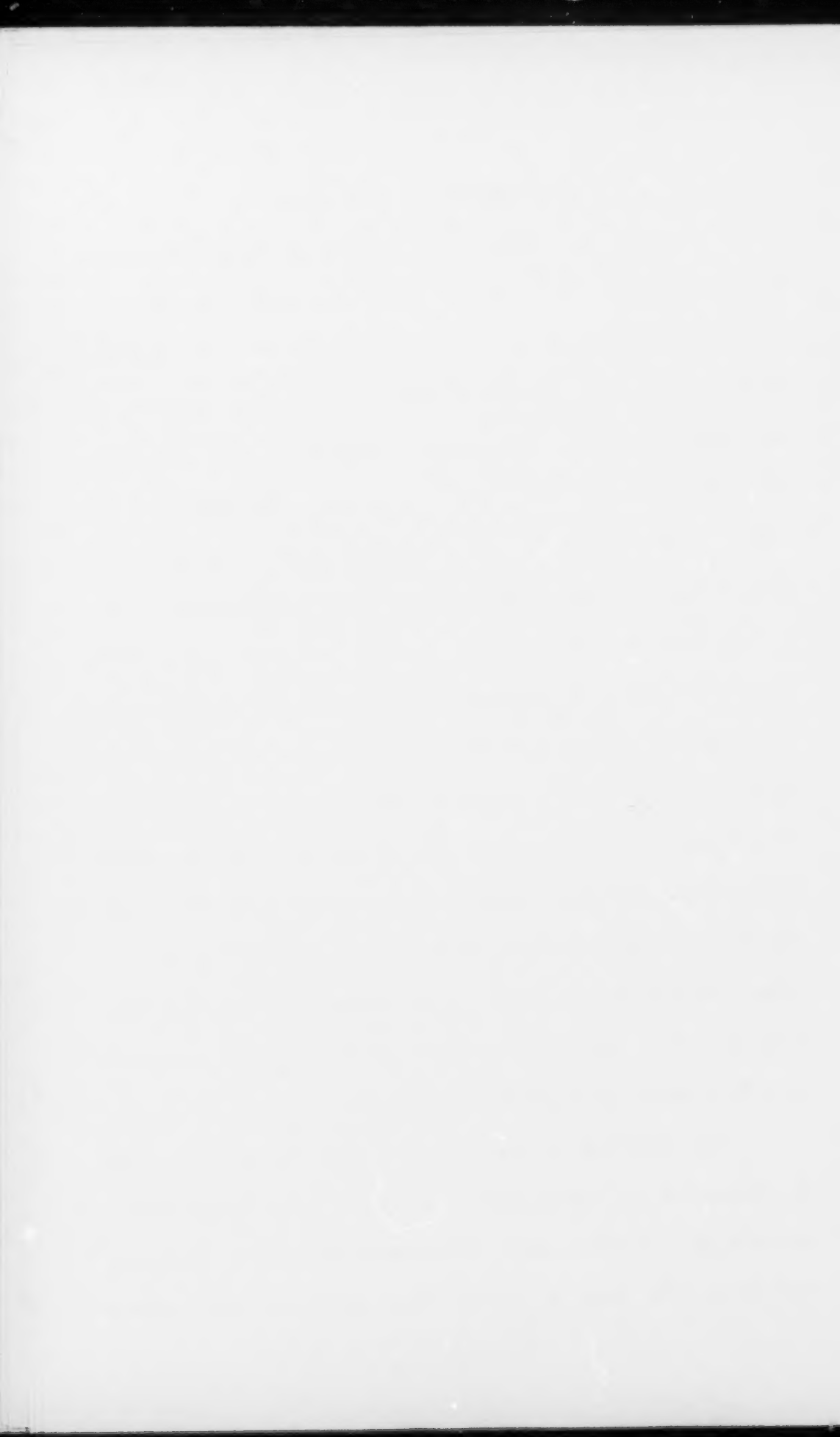
"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."



STATEMENT OF THE CASE

Luther A. Hegwood filed a dispossessory warrant against Mose Mathis and others to regain possession of real estate in Walker County. The trial Court (Superior Court of Walker County, Georgia) imposed the sanction of dismissal in Petitioners, November 10, 1982 for failure to appear for depositions scheduled on June 17, 1982 subsequent to a motion to withdraw filed on May 27, 1982 by Petitioner's counsel and prior to Petitioners retaining other counsel. Notice to take the depositions was served on the Petitioners' attorney of record May 28, 1982 and Petitioners contacted adverse counsel (counsel for Hegwood) on two occasions between June 8 and June 17, 1982 requesting that the depositions be re-scheduled. Petitioners' attorney of record was allowed to withdraw June 8, 1982.

The taking of said sanctions allows Luther A. Hegwood to take possession of the Petitioners' ancestral homes and surrounding real estate. Petitioners had a valid and meritorious cause



against Luther A. Hegwood et. al. which would have prevented a writ of possession, the mortgage instrument relied upon by Luther A. Hegwood et. al. having been fraudulently obtained by duress and misrepresentation; the alleged Hegwood lien also being subordinate to prior existing liens in favor of the United States Department of Agriculture Farmers Home Administration.

REASONS FOR GRANTING WRIT

The Petitioners are highly respected hard working members of the black race who have made their own way in a rural community by their diligence in the operation of a small business enterprise in excavation and waste disposal industries. They stand to loose not only their ancestral homes but all business equipment and machinery because sanctions were so readily imposed by the Georgia Court against their just and meritorious cause. Petitioners understood that the date for deposition would be rescheduled and were in contact with adverse

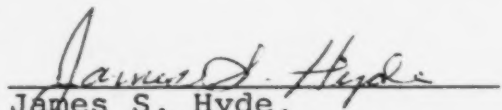


counsel for this purpose. The imposition of sanction dismissing their cause of action with full prejudice denied Petitioners due process of law and equal protection. These men and their families should be allowed their day in Court in order that the legality and fairness of the repossession case be heard on its merits.

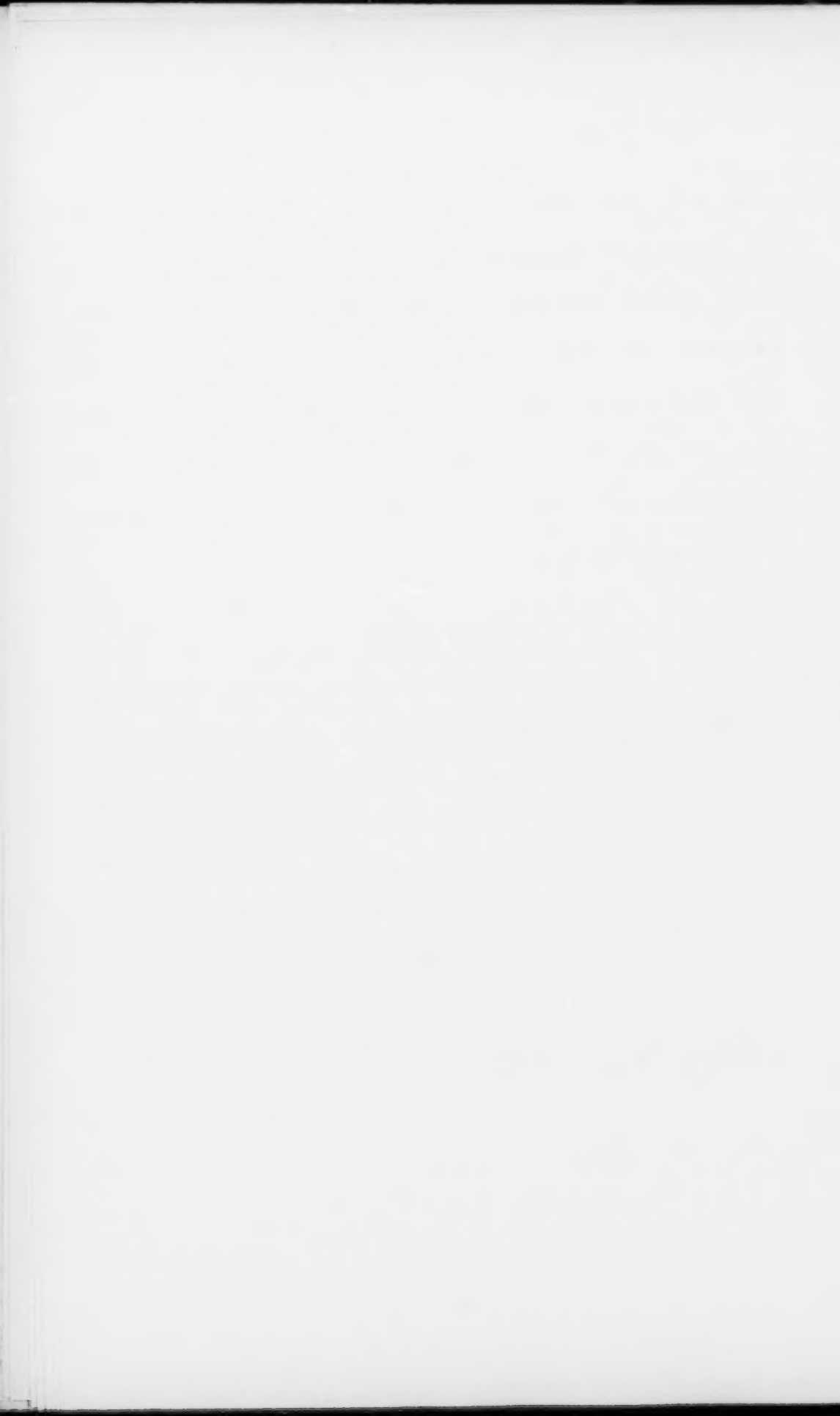
CONCLUSION

For the foregoing reasons, this Petition for Writ of Writ of Certiorari should be granted.

Respectfully submitted,

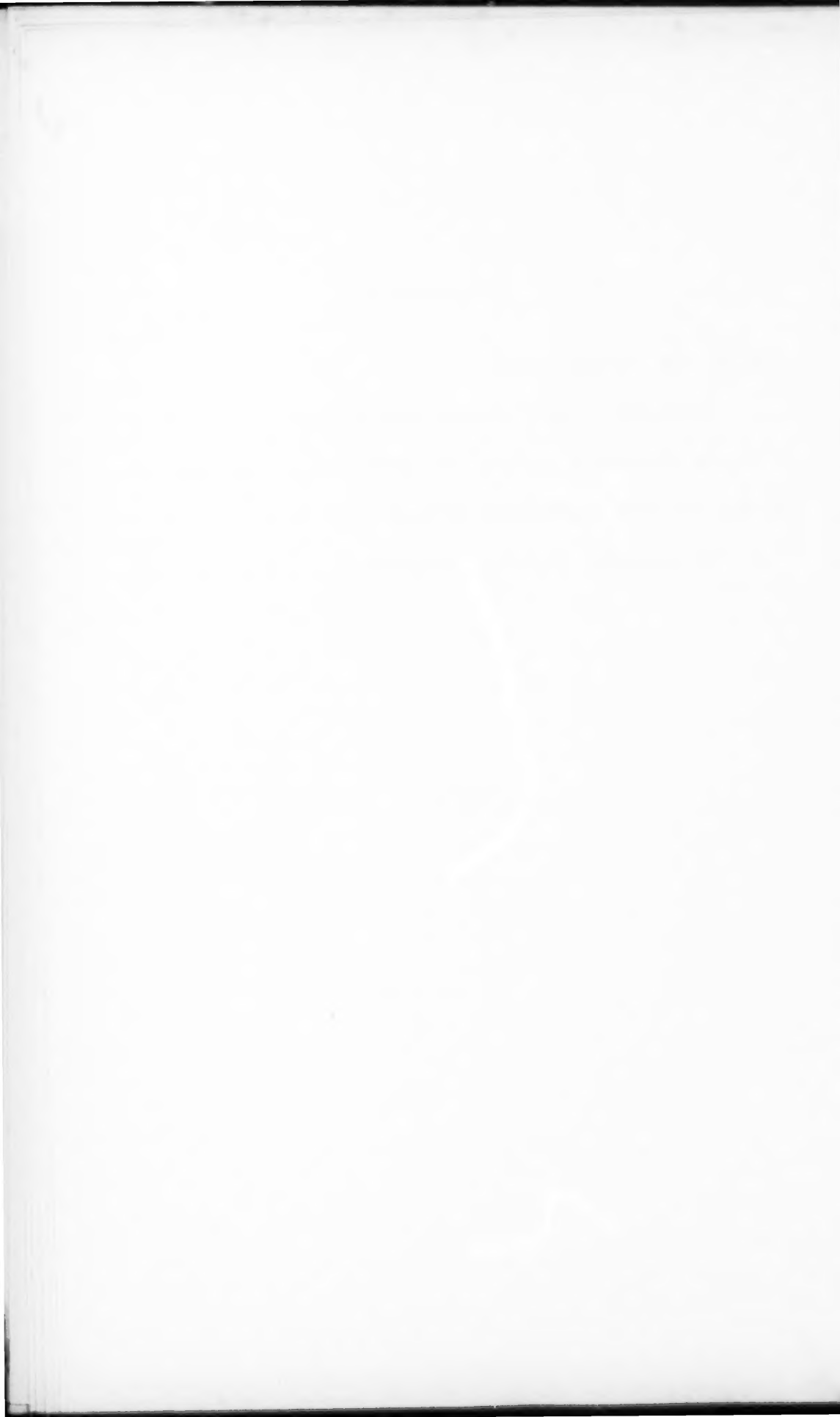

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May 16, 1984



APPENDIX A

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CLERK'S OFFICE, SUPREME COURT OF GEORGIA

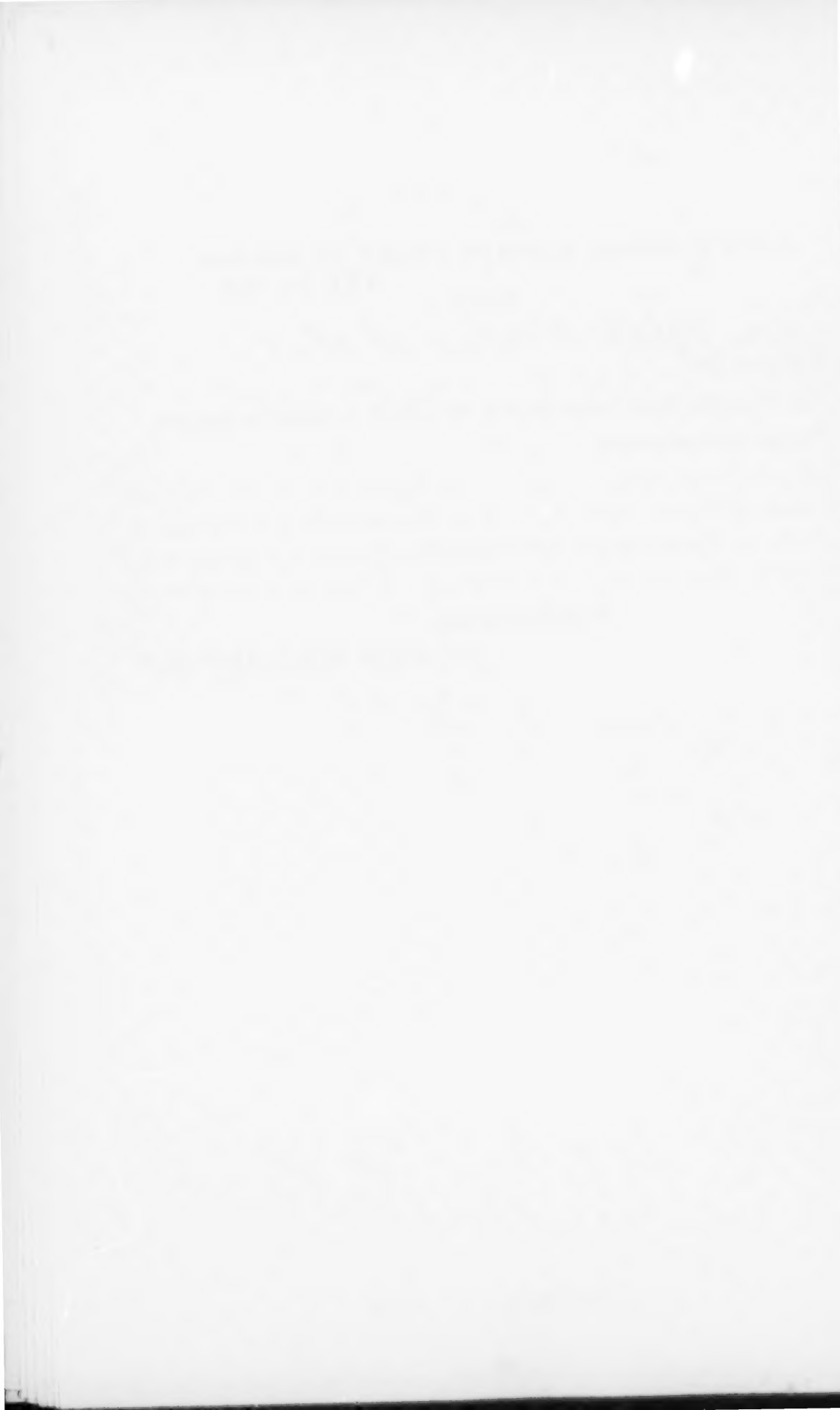
Atlanta FEB 22 1984

Case No. *40835 Mathis et al. v.*
Hegwood

The Supreme Court today denied the writ of certiorari in this case.
All the justices concur.

Very truly yours,

JOLINE B. WILLIAMS, Clerk



66812. MATHIS et al. V. HEGWOOD. 23-169
 SOGNIER, Judge, January 10, 1984
 Luther A. Hegwood filed a disposs-
essory warrant against Mose Mathis and others
to regain possession of real estate in Walker
County. After Mathis answered, Hegwood filed
notices to take depositions and to produce.
Mathis failed to appear at the deposition.
Three weeks later Hegwood moved the court pur-
suant to OCGA § 9-11 -37 (b) to impose the sa-
nction of dismissal because of Mathis' wilful
and flagrant failure to attend the scheduled
deposition. The trial court entered its order
on November 10, 1982, striking Mathis' answer
and entering judgment favor of Hegwood. An
interlocutory appeal from the trial court's
order was dismissed by this court for failure
to comply with the requirements of OCGA § 5-6-
34(b). No further action was taken until Feb-
ruary 22, 1983, when Mathis filed a "Motion to
Vacate and/or Amend Order Dated November 10,
1982." This motion was denied on March 14,
1983. Notice of appeal was filed on March 16,
1983, contesting the trial court's order of

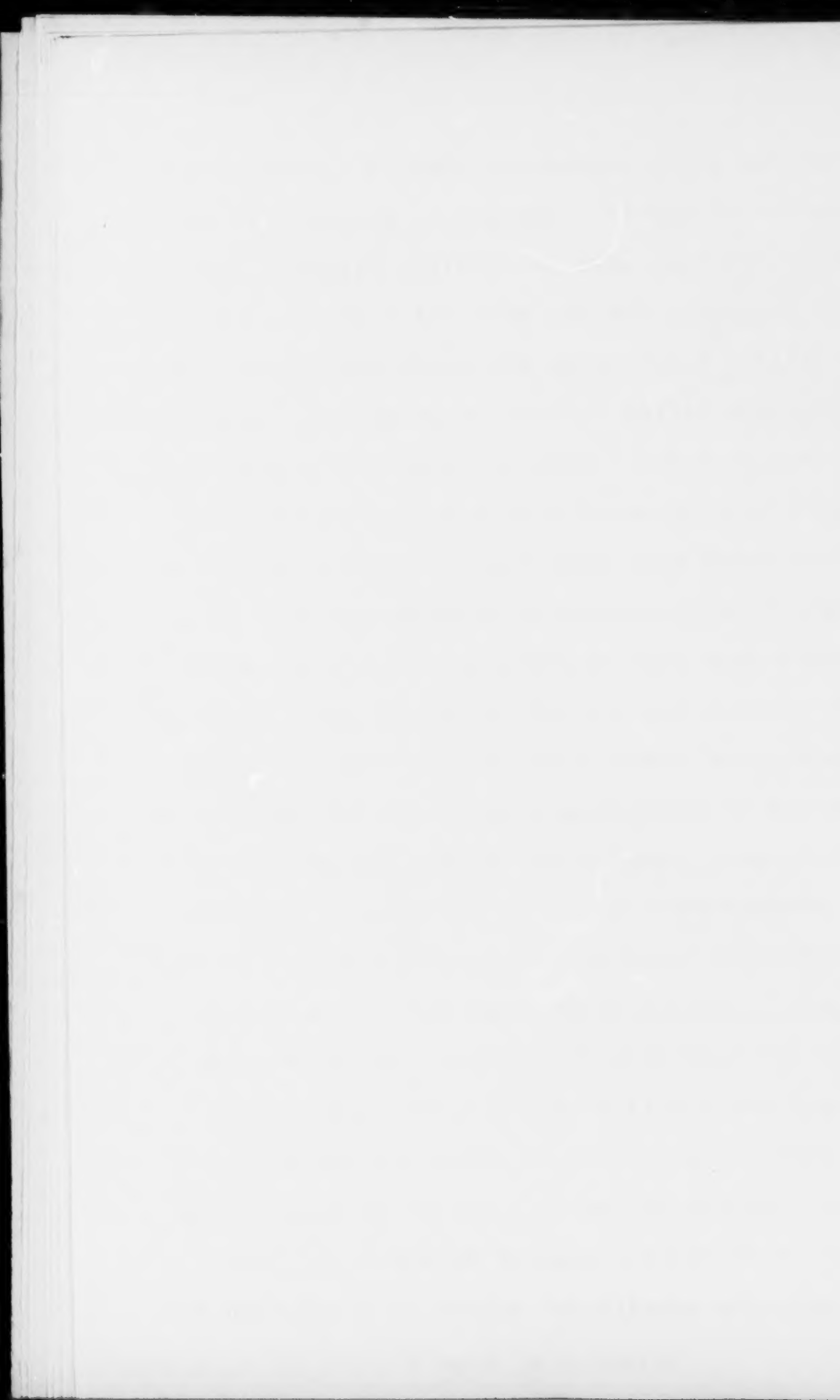


November 10, 1982, which imposed the sanction of dismissal on appellants.

A party must file a notice of appeal within 30 days after entry of the appealable decision or judgment of which he complains, unless a motion for new trial, or a motion in arrest of judgment or a motion for judgment notwithstanding the verdicts has been filed. OCGA § 5-6-38; Lawler V. Georgia Mut. Ins. Co., 156 Ga. App. 265 (1) (276 SE2d 646) (1980). The failure to file a notice of appeal within the time required by statute is one of the statutory grounds for dismissal of the appeal. OCGA § 5-6-48 (b)(1); Littlejohn V. Tower Associates Ltd., 163 Ga. App. 37, 38 (293 SE2d 33) (1982).

Appellants state in their Notice of Appeal that they are appealing from the denial of their "motion in arrest of judgment." No such motion was made as the record clearly reflects that the motion made by appellants was to "Vacate and/or Amend Order Dated November 10, 1982." Such a motion to vacate and/or amend is not one of the three statutory

motions which extend the time of filing of the notice of appeal. Johnson V. Barnes, 237 Ga. 502, 503 (229 SE2d 70) (1976); Taylor V. City of Columbus, 228 Ga. 493, 494 (186 SE2d 539) (1971). A motion to set aside will extend the time for filing the notice of appeal. Johnson, supra at p 504. However, a motion to set aside must be predicated upon some nonamendable defect which does appear upon the face of the record or pleadings, or such motion must be based upon lack of jurisdiction of the person or subject matter. OCGA§9-11-60 (d). Although appellants assert that their motion to vacate should be treated as a motion to set aside, appellants have failed to make any showing of a nonamendable defect or any lack of jurisdiction which would support a motion to set aside. Scott V. Morris Brown College, 164 Ga. App. 264 (1) (297 SE2d 45) (1982). There being no basis for a motion to set aside, appellants' motion to vacate and/or amend did not extend the time for filing of a notice of appeal from the trial court's order of November 10, 1982, dismissing appellants' answer as a sanction for



failure to appear at a scheduled deposition.

Appeal dismissed. Quillian, P.J.,
and Pope, J., concur.

IN THE SUPERIOR COURT OF WALKER COUNTY

STATE OF GEORGIA

MOSE MATHIS AND SIDNEY MATHIS
d/b/a MATHIS CONSTRUCTION AND
WASTE COMPANY: MOSE MATHIS:
SIDNEY MATHIS, MAMIE MATHIS:
AND EULA MATHIS,

Plaintiffs,

CIVIL ACTION
FILE

-VS-

NO: 26,419

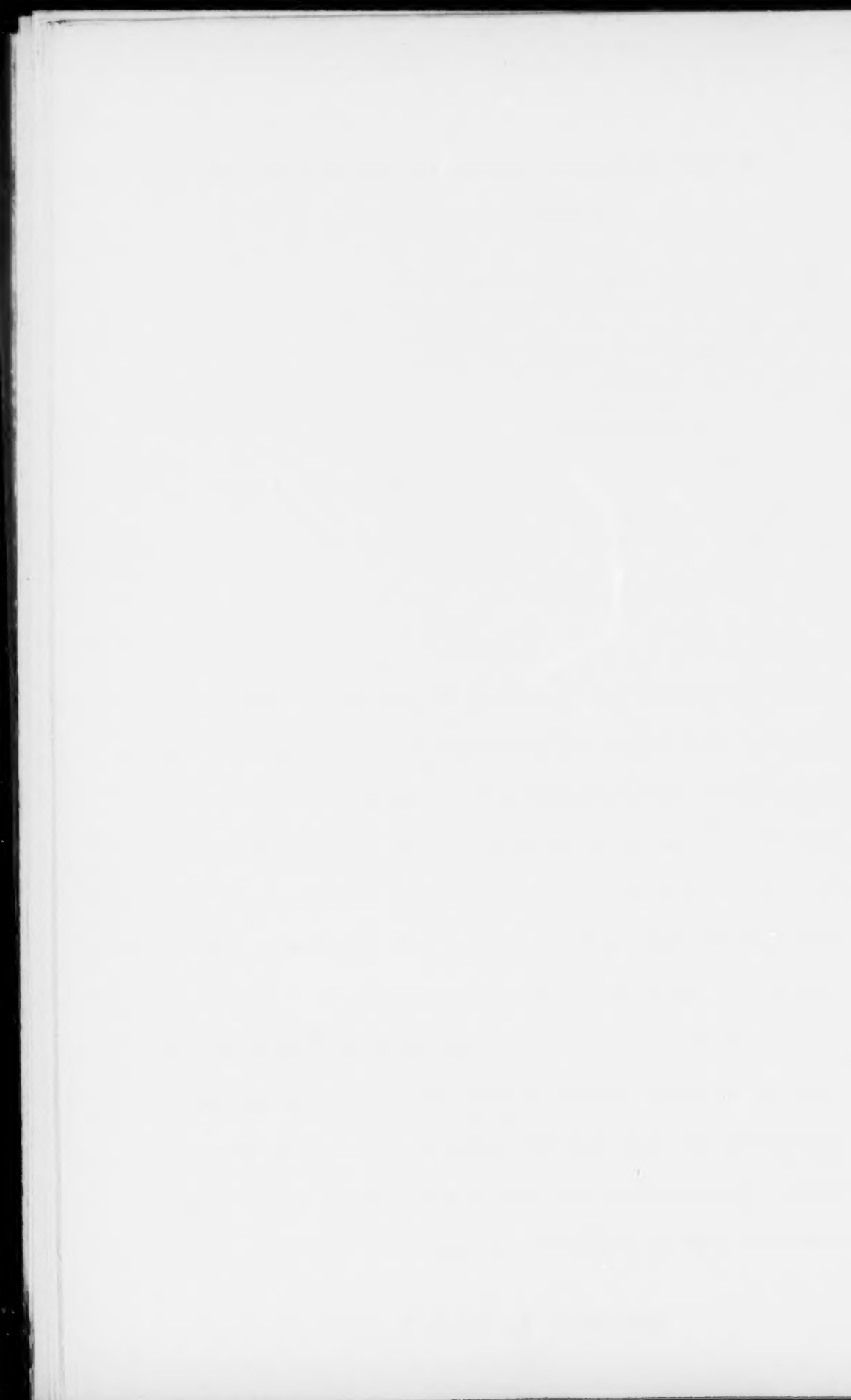
LUTHER A. HEGWOOD: RANDALL
WALKER: AND BANK OF LAFAYETTE,

Defendants,

ORDER

Defendants, Luther A. Hegwood, Randall Walker and Bank of Lafayette having moved the Court for the imposition of sanctions pursuant to the provisions of GA. CODE ANN §81A-137(d), this Court, upon consideration of the pleadings, affidavits, and argument of Counsel, hereby finds as follows:

On May 27, 1982, plaintiffs' then attorney of record filed a motion to withdraw as attorney of record for plaintiffs. On May 28, 1982, defendants served a notice to take depositions and a request to produce certain docu-



ments upon plaintiffs' attorney or record. On June 8, 1982, at a hearing before this Court on plaintiffs' attorney's motion to withdraw as attorney of record, in response to defendant Hegwood's objections that the withdrawal would interfere with the scheduled depositions, plaintiffs' attorney stated in her place that she had advised plaintiffs of the time and place of the depositions, as well as the requisite compliance with the notice for taking plaintiffs' depositions and request for documents. Plaintiffs' attorney motion to withdraw was granted pursuant to an order filed on June 8, 1982.

Thereafter, plaintiff Mose Mathis apparently telephoned the attorney for Randall Walker and Bank of Lafayette and informed the attorney that the plaintiffs were unrepresented and therefore would not appear at the scheduled depositions. It appears that at no time did Mr. Mathis suggest or request a change in time and place for the depositions and production of documents. Mr. Mathis did not establish any



contact with the attorney representing Hegwood.

Plaintiffs failed to appear on June 17, 1982, for the scheduled depositions, and defendants moved to impose the sanctions of dismissal of plaintiffs' complaint. On July 30, 1982, upon proper notice to plaintiffs, a hearing was held before the Court on defendants' motions for sanctions.

GA. CODE ANN. §81A-137(d) provides that the failure of a party to appear before the officer who is to take his deposition, after being served with the proper notice, is grounds for the imposition of sanctions.

Initially, plaintiffs contend that by virtue of their attorney of record's motion to withdraw filed on May 27, 1982, they were not represented by their attorney of record on or after May 26, 1982, (the date of the motion), therefore, service on May 28th on their attorney of record of the notice to take depositions and produce documents was insufficient service upon plaintiffs. Defendants contend that plaintiffs were represented by their attorney



ney of record until June 8, 1982, at which time the attorney was permitted by the Court to withdraw and that therefore, service upon plaintiffs' attorney was sufficient under the provisions of GA. CODE ANN. §81A-105(b).

With respect to plaintiffs' contention that service was insufficient, it appears plaintiffs did not terminate their employment contract with their attorney, rather their attorney unilaterally sought to withdraw as plaintiffs' attorney of record. The attorney's withdrawal was therefore not effective until the Court's order granting her motion for withdrawal. See ROOKE V. DAY, 46 Ga. App. 379, 167 S.E., 762 (1933). Moreover, the evidence shows that after plaintiffs' attorney filed her motion for withdrawal, plaintiffs' attorney filed her motion for withdrawal, plaintiffs' attorney of record continued to act in a representative capacity by accepting service of the notice to take depositions and request for documents and thereafter informing her clients of the necessity of compliance with the notices.

Furthermore, the evidence is uncontradicted that the plaintiffs had actual notice of the notice to take depositions and request for documents. Under these circumstances, service of the notice to take depositions and request for production of documents upon plaintiffs' attorney of record was in compliance with GA. CODE ANN, §81A-105(b) and was therefore sufficient service upon plaintiffs.

Plaintiffs further maintain that Mose Mathis' phone call to the attorney for Randall Walker and Bank of Lafayette evidences plaintiffs' willingness to comply with the notice to take depositions and request for documents which mitigates their failure to appear and that therefore, the sanction of dismissal should not be applied. Defendants maintain that plaintiffs' failure to appear evidences a conscious indifference to consequences amounting to wilful misconduct which justifies the sanctions of dismissal.

It is well recognized that "any failure of the type described in 37(d) permits invoca-

tion of the Rule, regardless of the reason for the failure," but the presence or absence of wilfulness is relevant to the Court's exercise of discretion in choice of sanction. MAYER V. INTERSTATE FIRE INSURANCE COMPANY, 243 Ga. 436, 254 S.E. 2d 825 (1979). Here, plaintiffs rely on the case of COOK V. LASSITER, 159 Ga. App. 24, 282 S.E. 2d 680 (1981) to support their proposition that Mr. Mathis' phone call to the attorney for Walker and Bank of Lafayette evidences plaintiffs' willingness to comply. However, COOK V. LASSITER, *supra*, may be distinguished. There, six days prior to the day scheduled for taking depositions, the appellant filed copies of two letters with the clerk seeking a change in the time and place for depositions. Appellee's attorney also received copies of the letters. The Court held that the letters showed a willingness to comply with the notice if appellee's attorney would agree to a change in time and place. Here, Mr. Matis merely phoned the attorney to advise him that the plaintiffs were unrepresented and would

and would not appear for the depositions. At no time, before or after the day scheduled for depositions., did Mr. Mathis seek to reschedule the depositions. Thus, plaintiffs' conduct does not evidence a willingness to comply. Rather, plaintiffs acted with a conscious indifference to consequences amounting to wilful misconduct. See MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., V. ECHOLS, 138 Ga. App. 593 226 S.E. 2d 742 (1976).

Accordingly, it is ORDERED AND ADJUDGED that plaintiffs complaint be and is hereby dismissed with prejudice and judgment be and is hereby entered in favor of defendants.

It is FURTHER ORDERED AND ADJUDGED that attorneys fees in the amount of \$100.00 plus expenses in the amount of \$28.20 are hereby awarded to Luther A. Hegwood, Defendant and that attorneys fees in the amount of \$100.00 plus expenses in the amount of \$28.20 are hereby awarded to Randall Walker and Bank of Lafayette, Defendants.

This 10th day of November, 1982



Lane W. Painter
JUDGE OF SUPERIOR COURTS,
LOOKOUT MOUNTAIN JUDICIAL CIRCUIT

APPENDIX B

AUTHORITIES CITED:

MEYER V. INTERSTATE FIRE INSURANCE
COMPANIES 243 Ga. 436; 254 SE 2d 825 (1979)

This case is cited for the rule that the presence or absence of willfulness is relevant to the trial court's exercise of discretion.

Certainly, the termination of a case by the imposition of sanctions, makes no determination on the merits of the essential issues involved, and the Court's exercise of proper discretion should take into consideration whether there has been a willful failure to comply in the case of a misunderstanding concerning the scheduling of depositions.

COOK V. LASSITER, 159 Ga. App. 24, 282 S.E. 2d 680 is cited to support the position of Petitioners that there was a willingness to comply. In the Cook case, the appellant had merely filed copies of two letters with the clerk seeking a change

in both time and place for the depositions. These were filed only six days prior to the scheduled time for the depositions.

In the instant case there is no question but that adverse counsel filed the notice to take depositions after the motion to withdraw was filed by Petitioner's then counsel, Appendix A, Page 6 and 7; and that Mr. Mathis called adverse counsel concerning the scheduling of the depositions and understood that they would be rescheduled, Appendix A, Page 10.